

King Broadcasting Company d/b/a KGW-TV and American Federation of Television and Radio Artists, Petitioner. Case 36–RC–5583

September 30, 1999

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX,
LIEBMAN, HURTGEN, AND BRAME

On June 6, 1995, the Regional Director for Region 19 issued a Decision and Direction of Election in the above-entitled proceeding, in which the Petitioner seeks to represent producers, associate producers, assignment editors, and copy editors employed by the Employer in the news department of its television station, KGW-TV, in Portland, Oregon.¹ Although the parties stipulated to the inclusion of the Employer's three associate producers² and one copy editor, the Employer contended that its six news producers and three assignment editors are supervisors within the meaning of Section 2(11) of the Act. The Regional Director concluded that the producers and assignment editors are statutory supervisors who must be excluded from the bargaining unit.

Thereafter, in accord with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely Request for Review of the Regional Director's decision. The election, which had been scheduled for July 21, 1994, was postponed sua sponte by the Regional Director. By Order dated June 6, 1995, the Board granted the Petitioner's request for review.

The Board has considered the entire record in this case, including the Employer's and the Petitioner's briefs on review, and concludes, contrary to the Regional Director, that neither the producers nor the assignment editors in the Employer's news department are statutory supervisors.

I. THE FACTS

The Employer operates a television station in Portland, Oregon. Its news department, which consists of approximately 63 employees, is responsible for local newscasts four times daily, and three times each on Saturdays and Sundays. The news department is headed by a news director whose job it is to oversee the department and to work with other department heads (operations/engineering, programming, public affairs, creative services, sales, and the business office), as well as the station manager, on long-range planning and research goals. The assistant news director of coverage and the executive producer (also referred to as the assistant news

director of programs) report to the news director, as do the on-air anchors and the chief photographer.³ At the time of the hearing, the position of news director was vacant, and Rebecca Millman—assistant news director of coverage—was performing that job as well as her own.

As assistant news director of coverage, Millman's responsibility is to oversee the news story planning process, help gather the news, and decide what story ideas will be developed into news stories. Millman (or the news director when that position is filled) determines the work schedules of the reporters. She also oversees the assignment editors. Ronald Mackovich, the executive producer, schedules the work of the producers and associate producers, produces specials, and fills in as a news producer when needed.

Millman, Mackovich, and the chief photographer (who schedules photographers and handles matters pertaining to photography equipment) work weekdays and are present during the noon and 5 p.m. newscasts and the first portion of the 11 p.m. broadcast. When they are not physically at work, they carry pagers so that they always may be reached.

Assignment editors: The job of the assignment editors is to compile a list of story ideas for newscasts from a variety of sources, including wire services and phone calls from the public. They also research story leads, listen to scanners for spot news, send photographers out to evaluate potential news items, and arrange appointments for reporter followup. The producers then make the selection of stories and how they will be presented within the Employer's general policy guidelines for types of stories and tone of coverage (e.g., hard news or human interest stories).⁴ On a daily basis, an assignment editor fills in the assignment sheet—a form that contains the reporter's name, a blank for the story that may be assigned that day, a photographer's name (if necessary), and what the type of assignment is, e.g., a live shot or a voice-over.

Planning meetings are held each day at 8:30 a.m. where the main focus is on which stories to use on the 5 p.m. newscast. At these meetings, the daily assignment editor—Molly Kretz—presents potential story ideas that she has selected and listed on the preliminary assignment sheet. The ideas and the format in which they will be covered are then discussed by the others in attendance, including Millman, Mackovich, the 6 a.m., noon, and 5 p.m. producers, one to six reporters, and two or three photographers, depending on availability.⁵ In addition,

³ The parties stipulated that these four positions are supervisory in nature, and should be excluded from the unit.

⁴ Mackovich stated that the general direction he gives his producers in this regard comes from the news director and research surveys which show what viewers are interested in seeing.

⁵ It is not entirely clear from the record whether any similar planning meetings are held for the weekend newscasts. The producer for the 11 p.m. newscast testified that he meets daily (around 2:30 p.m.) with the 5 p.m. producer, assistant producer, both assistant news directors, the 11

¹ The Petitioner currently represents a unit of reporters and on-air anchors, and a unit of photographers and engineering technicians. Editors are represented by the International Alliance of Theatrical and State Employees and Motion Picture Operators.

² Including the associate producer who also acts as producer for the 11 p.m. weekend newscast.

others at the meeting may have an idea for a story they would like to be assigned or Millman may specify particular stories she wants covered.⁶ Mackovich also holds daily informal meetings with the noon and 5 p.m. news producers to pass on general directions from the news director and to discuss the types of shows viewers want to see.

Stories are assigned after consideration of various factors, including a determination of whether there are any reporters and, if needed, photographers available for an assignment;⁷ which reporter/photographer team works best together on particular types of stories; regular assignments or “beats;” or a request from a reporter for a particular photographer. Also, if a reporter has expressed an interest in a particular story idea presented at the daily meeting, that story may be assigned to that reporter. Moreover, in assigning certain stories, an assignment editor will take into consideration a specific reporter’s background knowledge or make a judgment as to which reporter can best investigate and report that story or put a creative edge on it. If a story idea presented by a reporter is selected for coverage, that reporter most likely will be assigned the story. Thus, for example, the environmental reporter comes up with most of his own ideas, will set the stories up, and “nine times out of ten” will request a certain photographer to go with him (although not always the same photographer). Further, according to one reporter, less senior reporters do not generate as many story ideas as the more senior ones because those “junior reporters” do not have as many contacts or have not been in the area as long. Junior reporters, therefore, get most of their assignments from the assignment editor. In general, however, Kretz testified that she “doesn’t assign their jobs,” but “assigns stories for them to cover,” and tries to rotate all photographers and reporters.

Stories also may be assigned or reassigned during the course of the day. According to Mackovich, the assignment editor works as a “traffic cop” who, throughout the day, takes in and monitors a lot of information and redirects crews if a story falls through or a new story breaks. Kretz described her job as “somewhat of a dispatcher and a facilitator.” Thus, she testified that if she hears what may be a breaking story on a scanner, she will send out (or dispatch) a photographer to evaluate the situation and that “someone can write it later.” Further, she noted that, if something happens late in the afternoon or looks like it

will carry into the evening, “you just put the 11 p.m. reporter on that and not have to worry about overtime.” Or, she will try to find someone who either is having a “research day” or who has finished with a story, and ask that person to stay. “If they can’t,” Kretz stated, “[t]hen you have to go to the next person,” reassign a reporter from another story or call in a reporter. On weekends, the assignment editor uses a prepared call-in list. In addition, the assistant news director or the assignment editors also may call in a reporter if a scheduled reporter has called in ill.⁸ Occasionally, in the absence of an assignment editor or if an assigned story has fallen through, producers will assign reporters and/or photographers to stories.⁹

Reporters who are dissatisfied with their assignments discuss their concerns with the assignment editor, who may or may not make a change in assignments. Although Millman testified that the assignment editors have the final say as to the reporters’ assignments and as to which photographer works with which reporter, Kretz stated that there have been a couple of instances where the news director told her she was not to assign a particular reporter to a particular story.

Producers: The producers’ job is to organize, coordinate, and direct the production activities of daily newscasts. They are responsible for newscast content and presentation. Following the daily planning meeting, the producers complete a written “rundown.” This document describes the broadcast in detail and the producers’ decisions as to, inter alia, which stories will be shown, which reporter or anchor will present the story, the video content of each spot, whether the presentation will be live or on tape, what camera shots will be made, which graphic effects will be used, whether there will be introductions to segments, and where commercials will air within the broadcast. The producers also assign the writing of stories, introductions, story “teases,” and voiceovers. While they may review scripts, not all of them have done so on a routine basis, and the reporters, at times, have been instructed to submit their scripts to the executive producer for approval, due to the producers’ workload. However, if a producer is dissatisfied with a piece, the writer may be asked to rewrite it, it may be assigned to another person, or the producer may rewrite it.¹⁰ Millman and Mackovich review the rundowns for the weekday 5 p.m. show, and occasionally make changes.¹¹

p.m. assignment editor, and the reporter assigned to the 11 p.m. show. At that meeting, they go over what is planned for the 5 p.m. show and discuss as a group what will be assigned to the 11 p.m. reporter.

⁶ As we discuss, *infra*, the producers make the determination as to which story will appear on their show; however, Mackovich or Millman can veto or countermand the selection. The producers also make the final choice as to the format in which each story will be presented.

⁷ According to Mackovich, reporters scheduled to work will tell the assignment editors if they will be late coming in or will be leaving early for an appointment, and the assignment editor notes that fact on the assignment sheet.

⁸ Assignment editors also may call in engineering technicians for overtime work; however, they cannot require any employees to work the overtime. Kretz testified that when she knows she will need a crew to begin work early, she will clear the overtime with Millman.

⁹ One producer testified that although she can ask a reporter to cover a story, the reporter may refuse her request.

¹⁰ Anchors routinely rewrite stories written by others to fit their own style.

¹¹ It was not clear from the record whether either of them regularly review the rundowns for other broadcasts. Thus, the noon producer testified that either Millman or Mackovich may have her change the

Prior to an actual newscast, the producers coordinate the work of the other employees in the news department. Thus, at their direction, the associate producers write news stories, prepare video and graphic elements for use in newscasts, produce cable news cut-ins, make phone calls, do interviews or other news gathering, or check wire services and scanners. Similarly, reporters are given directions regarding format, angle, and length of the stories they have been assigned, and in-house photographers are given directions regarding the length of segments and camera angles to use.¹² The producers meet with anchors to discuss stories and presentation. The producers' rundowns provide an outline for the tape editors whose job it is to ensure that all tape is processed and ready to air. In addition, the producers decide whether to purchase news film from outside stringers.

During the newscast, the producer sits in the production booth with the show's director, technical director, audio engineer, and the operator of the TelePrompTer and Kyrion machines.¹³ The director follows the producer's rundown and instructions, and conveys this information to the rest of the technical team, giving them all noneditorial cues. The producer is responsible for the show's content and pace. Thus, during any given newscast, the producer may change a lead story, add or delete stories, alter the length of a piece, or give anchors editorial cues. On live shots, the producer talks directly to the field team about how to line up shots or to suggest lines of questioning, although reporters also suggest angles and lines of questioning, and either the producer or the director will give reporters their cues. The producer must communicate these rapid adjustments to the others in the production booth, and his decisions and directions on such changes are final.¹⁴

II. THE REGIONAL DIRECTOR'S FINDINGS

The Regional Director found that the Employer's assignment editors and its news producers are statutory supervisors. Thus, although he found that they do not hire, fire, evaluate, transfer, layoff, discipline, adjust grievances, reward employees, or effectively recommend such action,¹⁵ and that they do not have the authority to

approve requests for vacations or other time off, the Regional Director concluded that the assignment editors' role in making work assignments to reporters and photographers and the producers' role in assigning and directing employees in the performance of their duties constitute supervisory authority under the Act.

The Regional Director found that the assignments made by the assignment editors are not merely routine or clerical in nature, but rather, require the use of independent judgment. In particular, the Regional Director noted that the assignment editors consider such factors as a reporter's background knowledge and the relative skills and strengths of both reporters and photographers, that their decisions are final, and that no evidence conclusively establishes that their authority is limited by the dictates and countermands of management or that assignments are dictated or circumscribed by the availability of reporters and/or photographers. The Regional Director distinguished the Employer's assignment editors from the assignment editors found not to be supervisors in *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273 (5th Cir. 1986), enfg. 274 NLRB 1014 (1985), on the grounds that the latter primarily served as conduits for decisions made by higher management.

The Regional Director also concluded that the producers are supervisors because they responsibly direct employees, including anchors, reporters, and photographers. Thus, he found that the producers are "more than a part of an integrated team," as they have authority tantamount to full responsibility for their newscasts from the planning stage through on-air presentation, and make decisions without rigid guidelines or limitations. *WDTN-TV (Hearst Broadcasting Corp.)*, 267 NLRB 326 (1983);

commend such actions. The Employer relies on Mackovich's testimony that he gets feedback from producers regarding the job performance of reporters and photographers. Mackovich further stated, however, that he could recall only two instances and that in each he had been prompted to question a producer regarding a reporter's performance because of problems which he himself had noted. Also, Mackovich pointed out that although there is an annual performance evaluation process for news department employees, producers do not participate in the process either formally or informally. In addition, the Employer notes Millman's testimony that producer Steve Frank reported to her that one reporter was not doing certain parts of his job (i.e., the reporter had refused to conduct man-on-the-street interviews after the death of Jackie Onassis). Millman testified that she spoke directly with the reporter, and told him that he was to follow the producer's instructions. Millman then told Frank of the discussion and "that if he saw any other problems, he should let me know." Similarly, although Mackovich generally testified that producers occasionally might make recommendations regarding discipline or discharge of reporters or photographers, and apparently may informally speak with employees about something the producers feel has been done incorrectly or may take the problem to one of the senior managers, Mackovich stated that the producers may not take disciplinary action against employees. Thus, Mackovich testified that he would investigate the problem himself, but that it would be the news director's decision to take any formal disciplinary action. In these circumstances, as the Regional Director found, the producers' role in evaluating and/or disciplining any other employees does not rise to the level of supervisory authority.

order or add or delete stories, while the 11 p.m. producer stated that his rundowns are not reviewed by Millman.

¹² Millman testified that most disputes between producers and reporters are resolved collaboratively, but if this cannot be done, the producer's view is final. It was unclear whether the producers have the same authority with regard to any disputes with photographers.

¹³ The Kyrion machine superimposes names and graphics on the picture seen on the television screen.

¹⁴ One producer testified, however, that on-air anchors do not always follow his instructions. For example, if they do not shorten or delete discussion as he directs, he then has to adjust the show in other ways to fit into the time allotted.

¹⁵ In its Brief on Review, the Employer emphasized its contentions that the producers "exercise a greater role in the disciplinary and evaluation process than other employees." However, the Regional Director found, and we agree, that the record evidence does not support a conclusion that producers discipline or evaluate, or effectively rec-

Westinghouse Broadcasting Co., 195 NLRB 339 (1972). In addition, he found that there appears to be a certain degree of discretion and judgment involved in their assignment of work to reporters, anchors, and associate producers.

III. CONCLUSIONS

Section 2(3) of the Act excludes “any individual employed as a supervisor from the definition of “employee.” Section 2(11) of the Act defines “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the “possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class.” *Ohio Power Co. v. NLRB*, 176 F.2d 385, (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). Further, the Board is cautious in finding supervisory status because supervisors are excluded from the protections of Section 7 of the Act. “In light of this, the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organizational rights.” *East Village Nursing & Rehabilitation Center v. NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999). See also *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), enf. 171 NLRB 1239 (1968), cert. denied 400 U.S. 831 (1970).¹⁶ The burden of proving supervisory status is on the party alleging that such status exists. See, e.g., *Bennett Industries*, 313 NLRB 1363 (1994).

Contrary to the Regional Director, we find that the Employer has failed to meet its burden of establishing that either its assignment editors or its news producers are statutory supervisors. The Board has found that similarly situated individuals in the broadcast industry were not 2(11) supervisors where they were part of an integrated production team in which their skills and respon-

sibilities were joined in a collaborative effort with those of other news department employees in order to coordinate and develop a single product. Thus, in *Westinghouse Broadcasting Co. (WBZ-TV)*, 215 NLRB 123 (1974), the Board found that the employer’s producer/directors were not supervisors where they worked in concert with on-air talent, other producers, assistant directors, and “whatever number and kind of studio personnel” were required for a particular program. The Board concluded that the producer/directors functioned as part of an integrated production team, each member of which was independently capable of executing his own assignment, and therefore did not responsibly direct others in the performance of their duties. 215 NLRB at 125. Similarly, in *Post-Newsweek Stations*, 203 NLRB 522 (1973), the Board found that the employer’s editors did not exercise any control over how the stations’ newscasters carried out their own job responsibilities. Consequently, rather than a supervisory relationship, the Board found that equals were involved in separate but sequential functions in the development of a single product. 203 NLRB at 523.¹⁷ We find this precedent controlling in the instant case.

The Regional Director concluded that the Employer’s assignment editors and news producers were supervisors because they assign and/or direct employees. In applying the indicia of assignment and responsible direction in this case, however, the Board must distinguish between the exercise of independent judgment and the giving of routine instructions, and between the appearance of supervision and supervision in fact.¹⁸ Thus, it is well established that merely having the authority to assign work does not establish statutory supervisory authority.¹⁹ Further, not every act of assignment constitutes statutory supervisory authority.²⁰ As with every supervisory indicia, assignment must be done with independent judgment before it is considered to be supervisory under Section 2(11). Similarly, even the exercise of substantial and significant judgment by employees in instructing other employees based on their own training, experience, and expertise does not translate into supervisory authority responsibly to direct other employees.²¹ Here, as we discuss below, we find that the facts do not demonstrate the existence of supervisory status.

¹⁶ In reaching their determination, our dissenting colleagues rely extensively on *Beverly Enterprises, Virginia, Inc. v. NLRB*, 165 F.3d 290 (4th Cir. 1999) (en banc), and note that two other courts of appeals have not accepted the Board’s decision in *Providence Hospital*. They fail to mention that the Board’s approach to the supervisory issue in charge nurse cases has been explicitly upheld by the First, Seventh, Eighth, Ninth, and District of Columbia Circuits, and implicitly upheld by the Eleventh Circuit. See *NLRB v. Provident Nursing Home*, 187 F.3d 133 (1st Cir. 1999); *NLRB v. Audubon Health Care Center*, 170 F.3d 662 (7th Cir. 1999) (en banc); *Lynwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042 (8th Cir. 1998); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997); *Providence Alaska Medical Center*, supra; *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259 (11th Cir. 1999).

¹⁷ See also *Meredith Corp. v. NLRB*, 679 F.2d 1332, 1342 (10th Cir. 1982), enf. 243 NLRB 323 (1979).

¹⁸ *Providence Hospital*, 320 NLRB 717, 725 (1996), sum. judg. enf. sub nom. *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997); *McCullough Environmental Services*, 306 NLRB 565 (1992), enf. denied 5 F.3d 923 (5th Cir. 1993).

¹⁹ See, e.g., *Mississippi Power & Light Co.*, 328 NLRB No. 146 (1999); *Ten Broeck Commons*, 320 NLRB 806, 811 (1996); *Telemundo de Puerto Rico v. NLRB*, 113 F.3d 270 (1st Cir. 1997).

²⁰ *Providence Hospital*, supra, 320 NLRB at 727.

²¹ *Westinghouse Broadcasting Co. (WBZ-TV)*, supra 215 NLRB at 125; *Washington Post Co.*, 254 NLRB 168, 205 (1981). See generally *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d at 1262.

Assignment editors: Contrary to the Regional Director, we find that portion of the assignment editors' job which requires them to make certain that story ideas are matched with reporters and photographers is not supervisory.

As the record shows, on a daily basis, the assignment editors search through and contact various sources to come up with potential stories to be included in the four shows regularly broadcast each weekday and the six weekend shows. The assignment editor prepares a listing of suggested story ideas and initially may designate a particular reporter (and perhaps, photographer) to cover a specific story. The actual designation of reporters and photographers, however, is based on a combination of factors.²² These include, inter alia, the various reporters' and photographers' known backgrounds and/or specific skills; their availability and/or regular beats;²³ previous similar assignments; the need to have a fast-breaking story covered immediately; requests for a particular photographer by a reporter; whose idea the potential story was; and, sometimes, simply the next individual in rotational order.²⁴

We therefore disagree with the Regional Director's finding that such assignment requires the use of independent judgment. Assignments based on assessment of employees' skills when the differences in skills are well known have been found routine,²⁵ as have assignments made to equalize employees' work on a rotational or other rational basis.²⁶ Further, while it is the assignment editors' responsibility to ensure that all stories are covered, the record clearly shows that the assignment of story coverage is a collaborative effort on the part on the part of all involved, particularly those assignments made as a result of the daily planning meetings.

The Regional Director found that the Employer's assignment editors are distinguishable from the assignment editors found not to be supervisors in *NLRB v. KDFW-TV*, supra. In reality, the only difference between the assignment editors in this case and those in *KDFW* is that the latter served primarily as conduits for decisions (as-

signments) made by the coverage manager. On their own they made only routine assignments based on availability (which could subsequently be overruled by the coverage manager) and changed assignments only after consultation with the coverage manager. This is a distinction without a difference. In the instant case, although the assignment editors have more freedom in initially designating reporters and photographers to cover a story, as in *KDFW*, there is no showing that the Employer's assignment editors are required to exercise the independent judgment essential to a finding of supervisory status. *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995).²⁷ While we do not discount the importance of the role played by the assignment editors, mere importance does not make the judgments rendered by such individuals supervisory in nature.²⁸

Producers: Again, contrary to the Regional Director, we find that the producers are not statutory supervisors. Although the content and format of each broadcast is their responsibility, the latitude with which they exercise such responsibility is not determinative of supervisory status absent the exercise of statutory authority within the meaning of Section 2(11).²⁹

As the Regional Director found, the producers exercise "a certain degree of influence and discretion," as well as expert judgment, in the coordination and creation of each production. We note, however, that any discretion or judgment the producers exercise in making and communicating necessary directions relates to their own responsibilities and is based on their experience and expertise.³⁰

²⁷ *Taft Broadcasting*, 226 NLRB 540 (1976), the only case involving the broadcast industry relied on by our dissenting colleagues, is readily distinguishable. The assignment editor in *Taft* not only determined which stories would be covered, how extensively, and by whom, but he also evaluated employees, was authorized to recommend discharge and he could require employees to work overtime (contrary to the instant case) or call in additional employees. Contrary to our dissenting colleagues' assertion, no one factor was "central" to the Board's reasoning in finding that the *Taft* assignment editor was a supervisor; rather, it is clear that the Board found that it was the combination of these factors and the extent of the assignment editor's authority in personnel matters that demonstrated the assignment editor's supervisory status.

²⁸ *NLRB v. Provident Nursing Home* supra, (important roles are played by many people who are not supervisors). Accord: *Cooper/T. Smith*, supra.

²⁹ While it is possible that an individual may possess supervisory authority that has not been exercised, absent exercise, there must be other affirmative indications of such authority. *East Village Nursing & Rehabilitation Center*, supra, slip op. at 6. In the instant case, we find none.

³⁰ See, e.g., *Westinghouse Broadcasting Co. (WBZ-TV)*, supra, 215 NLRB at 126, where the Board noted that the role of the producer/director is analogous to that of radio newsroom editors in relation to local reporters and to newscasters, citing *Post-Newsweek Stations*, supra:

[T]he excellence and great responsibility required of the editors involves only their obligations with respect to the development of their own work product and how it fits into the formulation of the broadcast schedule and the station's scheme of operation, and not with respect to the direction or control of the activities of other

²² Accord: *Washington Post Co.*, supra, 254 NLRB at 205.

²³ As noted earlier, the record shows that actual weekday work schedules and weekend on-call lists for the reporters are determined by Millman, and that the photographers' work schedules are determined by the chief photographer.

²⁴ In addition, the record shows that, if a story a reporter is working on is dropped from an upcoming broadcast, he or she will go to the assignment desk to pick up another story. Further, at least one reporter testified that the news director, executive producer, or assistant news director of coverage occasionally assigns stories to him; the 11 p.m. producer testified that if he has an idea for a story not mentioned at the planning session, he will ask the assignment editor to assign the story or will do it himself if the assignment editor is absent; and the noon producer stated that she may directly ask a reporter to do a story (although she noted that the reporter could refuse her request) or will ask the assignment editor if anyone is available to do the story.

²⁵ *Clark Machine Corp.*, 308 NLRB 555, 555-556 (1992).

²⁶ *Ohio Masonic Home*, 295 NLRB 390, 395 (1989); *Providence Hospital*, 320 NLRB at 727.

Thus, it is their responsibility to organize, coordinate, and direct the production activities of the daily newscasts. They select stories and format, complete specific "rundowns" for each broadcast (including the listing of stories to be used, format, length, order or presentation, and placement of commercials) and make changes in the rundown from the broadcast booth during a newscast. Making such decisions is the essence of their jobs. The communication of those decisions and coordination of their implementation with other news department employees does not, however, entail the exercise of supervisory independent judgment. Rather, the instructions given to other employees are either almost routine in nature or are motivated by the creative or artistic effect the producers seek to achieve.³¹

Moreover, the producers collaborate on a daily basis with a variety of other employees, including skilled technicians, reporters, photographers and on-air talent, in determining the content and the presentation of the various newscasts. Thus, they participate in the morning planning meetings with Mackovich and Millman, as well as the assignment editor and various reporters and photographers. The producer for the 11 p.m. broadcast meets every afternoon with the 5 p.m. producer, assistant producer, both assistant news directors, the evening assignment editor and the reporter assigned to the 11 p.m. show. At that meeting, the participants review what is planned for the 5 p.m. newscast and discuss as a group what will be assigned to the 11 p.m. reporter.³²

We recognize that it is often difficult to separate the exercise of judgment necessary to the performance of an individual's own job from the supervisory independent judgment of Section 2(11) of the Act, particularly where skilled employees are directing other skilled employees, or professional employees are directing nonprofessional employees.³³ However, the authority of an individual employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position is not supervisory authority. In these circumstances, such directions simply are incidental to the employees' ability to perform their own work. In the instant case, we find that the Employer's producers are part of an integrated production team, each member of which is independently capable of executing his assignment. *Westinghouse Broadcasting Co. (WBZ-TV)*, supra. See also *KDFW-TV*, supra, 790 F.2d at 1278; *Meredith Corp.*, supra.³⁴ The reporters and photographers, who

participate in the collaborative effort to determine which stories will be covered by contributing story ideas and suggesting ways in which the stories may be developed, are responsible for their own work. Thus, the relationship of the producers to other news department employees is not supervisory, but rather, is one of coworkers involved in separate but sequential functions in the development of a single product. See generally, *Post-Newsweek Stations*, supra. It is only where the facts of a particular case have shown that a producer or group of producers additionally had authority over such personnel matters as, inter alia, the immediate day-to-day supervision of cameramen, news reporters, film processors, and file editor, or that they played a role hiring, evaluating, reprimanding the employees they directed, and used independent judgment in exercising such authority, have such producers been found to be supervisors.³⁵

In conclusion, it is clear that the assignment editors and news producers exercise expert judgment in the execution of their creative and technical responsibilities. It has not been established, however, that they exercise supervisory independent judgment in assigning or directing other employees in the performance of their duties. Accordingly, for the above reasons, we find that the Employer has not established that either its assignment editors or its news producers are statutory supervisors, and that they may be included in the petitioned-for unit.

ORDER

The Regional Director's decision finding that the Employer's news producers and assignment editors are statutory supervisors is reversed.

The case is remanded to the Regional Director for further appropriate action.

MEMBERS HURTGEN AND BRAME, dissenting in part.

Unlike our colleagues, we would exclude KGW-TV's assignment editors from the unit. We find that the assignment editors are supervisors within the meaning of Section 2(11) of the Act based on their role in assigning work to employees.¹

Section 2(11) defines "supervisor" to mean:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine

employees. Consequently, it does not reflect supervisory status. 203 NLRB at 523.

³¹ See, e.g., *Westinghouse Broadcasting Co. (WBZ-TV)*, supra, 215 NLRB at 125.

³² The record was not clear whether any similar planning meetings are held for the weekend newscasts.

³³ *Providence Hospital*, 320 NLRB at 730.

³⁴ As one court succinctly has stated: "[E]very order giver is not a supervisor. Even the traffic director tells the president of a company

where to park his car." *NLRB v. Security Guard Service*, 384 F.2d 143, 151 (5th Cir. 1967).

³⁵ See, e.g., *Westinghouse Broadcasting Co.*, 195 NLRB 339 (1972); *WDTN-TV (Hearst Broadcasting)*, 267 NLRB 326 (1983). Compare *KDFW-TV*, supra.

¹ We note that the Employer did not file a request for review of the Regional Director's decision.

or clerical nature, but requires the use of independent judgment.

Thus, individuals qualify as supervisors if: (1) they are authorized to perform or recommend at least one of the twelve duties enumerated above; (2) their authority is exercised in the interest of the employer; and (3) the exercise of that authority requires the use of independent judgment.²

I. FACTS

At its television station in Portland, Oregon, KGW-TV broadcasts local news each weekday at 6 a.m., noon, 5 p.m., and 11 p.m., and on weekends at 8 a.m., 5 p.m., and 11 p.m. KGW-TV's three assignment editors work between the hours of 7 a.m. and 11 p.m. weekdays and between 8 a.m. and 10 p.m. weekends. The assignment editors are KGW-TV's agents for determining which reporter and, if necessary, photographer to assign to particular stories for the local newscasts. They prepare daily assignment sheets for the approximately 11 reporters and 15 photographers. It is undisputed that the assignment editors have the final say as to which reporter is assigned to a particular story and which photographer is assigned to work with that reporter.

The assignments to reporters and photographers are key building blocks for developing and sustaining careers in broadcast journalism. In making these story assignments, the assignment editors consider many factors and decide, on their own, which matters have the greater weight in any given situation.³ It is undisputed that their choice of reporter and photographer is not dictated by any set pattern or any rotational system based on the availability of the reporter and photographer that has been devised by KGW-TV.⁴ The assignment editors juggle many other factors besides availability and follow no magic formula in making their assignment decisions. They consider who best can investigate and report a certain story; who best can put a creative edge on a certain

story; and which reporter/photographer team works best together to create particular types of stories. They often weigh the reporter's background knowledge of the subject matter of the story or the personalities of the reporter and photographer in working together on past assignments. They may also think carefully about the relative skills and strengths of the reporters and photographers, but it is undisputed that there is no predetermined practice or scheme attaching particular skills of the reporters and photographers to certain story types. Rather, the assignment editors must decide for themselves, on a case-by-case basis, which reporter and photographer will be able to handle the nuances and difficulties associated with any particular story.⁵ The assignment editors have the discretion to assign a reporter to a story idea which was generated by that reporter or to honor or reject a reporter's request for a particular photographer. The assignment editors also have the authority to reassign a reporter and a photographer if a new story develops sometime later in the day or if the story originally assigned to them did not pan out well or was dropped for that day's broadcasts by the news department. Based on their own assessments, the assignment editors may call in reporters and photographers to handle these reassignments, and throughout the day they keep track of and approve requests from the reporters and photographers to come in late, leave early, or take a couple of hours off for purposes of a doctor's appointment.

Reporters who are dissatisfied with their story assignments may and do discuss their complaints with the assignment editors. The assignment editors have the authority to resolve these complaints.

II. DISCUSSION

In agreement with the Regional Director and contrary to our colleagues, we believe that the above facts show that the news story assignments given by the KGW-TV assignment editors involve the exercise of statutory authority. The Board in *Taft Broadcasting*⁶ was presented with a similar supervisory question involving a television station assignment editor. In that case, the Board also found supervisory status for that individual. Central to the Board's reasoning in *Taft* was the ability of the assignment editor, on his own, to "make the final decision" regarding the selection of reporters and photographers to news stories. As in the instant case, the *Taft* assignment editor determined who would cover and report on particular stories, and he was additionally responsible for moving people around to get maximum news story coverage throughout the day. Similarly, in *Beverly Enter-*

² See *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994).

³ Cf. *NLRB v. KDFW-TV*, 790 NLRB 1273 (5th Cir. 1986), enf. 274 NLRB 1014 (1985); *North Shore Weeklies*, 317 NLRB 1128 (1995); and *McCullough Environmental Services*, 306 NLRB 565 (1992), enf. denied 5 F.3d 923 (5th Cir. 1993). In *KDFW-TV*, the assignment editors were found not to be statutory supervisors where they relayed work assignments to employees that had already been made by the coverage manager or modified such assignments only after consultation with higher-level managers. In *North Shore Weeklies*, the press supervisors of the newspaper publishing and commercial printing company merely gave work assignments to crew members from a scheduled work list prepared by upper management. Thus, they were not required to use Sec. 2(11) independent judgment in making such assignments. In *McCullough*, the lead operators' minimal role in assigning tasks consisted of simply relaying directives prepared by upper management to the operators at the start of their shift. Thus, the lead operators working at the employer's Savannah Street wastewater treatment plant did not meet the requirements of Sec. 2(11) of the Act.

⁴ Cf. *Ohio Masonic Home*, 295 NLRB 390, 395 (1989) (where the nonsupervisory charge nurses equally distributed the work tasks to the aides according to a rotational system).

⁵ Cf. *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259 (11th Cir. 1999) (nonsupervisory docking pilots of a stevedoring company made tugboat assignments following a ship schedule provided by the employer; they did not consider the particular skills and experiences of the crews manning the tugboats).

⁶ 226 NLRB 540, 541 (1976).

prises, Virginia, Inc. v. NLRB,⁷ the nursing home charge nurses had complete authority to assign nursing assistants to work tasks and to assign and reassign them particular wings and patients, and they also filled out daily assignment sheets for the nursing assistants. The court found that such assignment decisions, made without guidance from upper management and without guidelines or established criteria, clearly required judgment that is “much more than ministerial,” and thus constituted supervisory authority within the meaning of Section 2(11) of the Act.⁸

In reversing the Regional Director’s finding of supervisory status, our colleagues ignore this precedent and improperly minimize the independent judgment exercised by the KGW-TV assignment editors in assigning work to the reporters and photographers. First, the majority argues that there is no supervisory element involved in the assignment decisions because these work assignments occur after a “collaborative effort” process engaged in by the assignment editors, reporters, photographers, and others in compiling the list of story ideas for the daily newscasts, especially those stories that are discussed at the daily planning meetings of the news department. While it is true that some assignments may be openly discussed with the reporters and photographers at those meetings, other assignments are not. The record further shows that these discussions do not necessarily control the actual selections made by the assignment editors. The assignment editors are completely free to ignore the views and opinions of the reporters and photographers, and follow their own judgment in making the assignments. Contrary to our colleagues’ suggestion, the fact that the assignment editors may be open and willing to listen to their subordinates’ viewpoints represents an example of modern supervisory practices of involving employees in the process rather than dictating from above. Problem solving using a management/employee team approach has become very prevalent in today’s workplace. Its practice here does not diminish the supervisory authority of the assignment editors who are ultimately responsible for the personnel decisions at issue.⁹

Second, our colleagues incorrectly argue that the assignment decisions involve only routine action because they supposedly reflect only an assessment of well-

known skills possessed by the reporters and photographers, and they follow a rotational schedule based on availability. These assignments, however, must reflect both the editorial policy of the station and personnel judgments. The record is replete with statements demonstrating that “skills” and “rotation” are not the sole or predominate factors considered by the assignment editors. According to the undisputed evidence, the process of selecting reporters and photographers may involve many other factors (e.g., employee background, preference, past work assignments, personalities, etc.) besides a possible consideration of the particular individual’s skills and availability. Unquestionably, these assignment decisions are far from predictable since no one factor must take precedence in the assignment editors’ thinking. Rather, the assignment editors are at liberty to use their own judgment and decide for themselves whether any specific factor or combination of factors should guide in a given assignment situation. Thus, our colleagues’ attempt to isolate “skills” and “availability” lacks underlying record support.

In this connection, we also find the following cases relied on by our colleagues to be distinguishable. In *Post-Newsweek Stations*,¹⁰ the Board found no supervisory status for the radio news editors who had no authority to order the newscasters to cover particular stories or fill in for unavailable newscasters. Rather, the newscasters could choose whether to cover the stories assigned by the editors. Thus, the editors’ role in assigning work was limited to bringing a story idea to the attention of the newscasters. Unlike the KGW-TV assignment editors, these editors had no final authority regarding assignment decisions. By contrast, the KGW-TV assignment editors have the final authority to respond to reporters’ and photographers’ complaints about their assignments.

In *Westinghouse Broadcasting Co.*,¹¹ the producer/directors of a television station lacked the authority to assign crew members to particular programs; rather, that was the responsibility of the production supervisor or the technical supervisor in the engineering department. The producer/directors could merely request that specific individuals be assigned to work as a crew on particular stories. There was no guarantee that such requests would be honored. Here, in contrast, the KGW-TV assignment editors have the final authority to assign stories to the reporters and photographers, and have them work as a crew, if necessary.

In *Washington Post Co.*,¹² the Board found that the metro department area editors, except the night metro editor, were supervisors where, like the KGW-TV assignment editors, they had the authority to assign a variety of story types to several reporters (between 5 and 30

⁷ 165 F.3d 290 (4th Cir. 1999) (en banc).

⁸ Id. at 298. Accord: *NLRB v. Attleboro Associates*, 176 F.3d 154, 166–167 (3d Cir. 1999) (decisions made by nursing home licensed practical nurses to assign work to certified nursing assistants were “inseparable from the exercise of independent judgment”). [Citation omitted].

⁹ For some examples of employee participation in decision-making in the workplace and cooperative efforts among managers, supervisors, and employees that have significantly emerged since the 1970’s, see the law review articles cited by former Members Oviatt and Raudabaugh in their separate concurring opinions in *Electromation, Inc.*, 309 NLRB 990, 1004, 1005–1006 fns. 1–6 (1992), enf. 35 F.3d 1148 (7th Cir. 1994).

¹⁰ 203 NLRB 522, 523 (1973).

¹¹ 215 NLRB 123, 125 (1974).

¹² 254 NLRB 168 (1981).

depending on the editors' sections). The night editor had limited authority to deal with emergency-type, fast-breaking, late-developing stories which the paper was required to cover, and only two reporters worked the night metro shift. Thus, unlike the KGW-TV assignment editors, the night metro editor had limited authority and even more limited choices in matching the story to reporter.

The KGW-TV assignment editors' authority is also broader and more involved than that of the assistant foreman in *Clark Machine Corp.*¹³ In that case, Assistant Foreman Woolfrey assigned small, routine, and often repeat, jobs to fabrication shop employees whose differences in abilities were well known. He chose employees based solely on the individual's skills and availability. On repeat jobs, he simply gave the job to the shop employee who had previously done it, and the cleanup and maintenance tasks regularly went to the shop employee who was available. Given these facts, the Board concluded that Woolfrey performed a routine assignment function and did not use the independent judgment required of a supervisor within the meaning of Section 2(11) of the Act. In the instant case, however, the KGW-TV assignment editors consider and weigh many factors in making their assignment selections, including the reporter's background knowledge, investigative and reporting skills, creativity, availability, and preferences, and which reporter/photographer team works best together to create particular types of stories. Thus, the assignment editors' assessment requires more independent thought and judgment in matching the individuals to the stories than that exercised by Woolfrey whose approach was restricted to "skills" and "availability."

In *Providence Hospital*,¹⁴ the Board majority found that the registered nurses (RNs) who acted as charge

nurses, team leaders, home health care on-call leads, and the lead nurse in the neuro outpatient rehabilitation center did not exercise supervisory independent judgment in assigning work to other hospital personnel. The Board majority observed, inter alia, that these assignment decisions were simply based on an assessment of patient needs and employee skills, or employee availability. For example, the charge nurses assigned daily tasks to other RNs based on an assessment of the patients' needs and acuities, and the RNs' skills. The Board noted that in practice, however, there was little evidence that patients' needs or RNs' skills differed significantly within a particular unit. Furthermore, RNs who did not serve as charge nurses also assessed patients' needs and were equally knowledgeable about each other's skills; thus, these nonsupervisory RNs sometimes asked other RNs to perform particular tasks, and traded patients among themselves. The charge nurses also assigned work to the aides and licensed practical nurses (LPNs) by simply equalizing the number of patients among the number of available aides or LPNs. Unlike the situation with the *Providence* charge nurses, there is no evidence that the KGW-TV reporters give assignments to one another, or can trade stories on their own initiative. Rather, the assignment editors make all assignments here, and they must consider the various broadcasting skills and creative talents among the reporters and photographers to make sure that the stories are developed and depicted in the best possible journalistic way.

Thus, we find that the assignment decisions made by the assignment editors constitute the authority to assign work using independent judgment within the meaning of Section 2(11) of the Act.

have rejected the Board's *Providence Hospital* supervisory analysis. See *Beverly Enterprises*, supra; *Passavant Retirement & Health Care Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998); *Mid-America Care Foundation v. NLRB*, 148 F.3d 638 (6th Cir. 1998); *Grancare v. NLRB*, 137 F.3d 372 (6th Cir. 1998); *Glenmark Associates v. NLRB*, 147 F.3d 333 (4th Cir. 1998).

¹³ 308 NLRB 555, 556 (1992).

¹⁴ 320 NLRB 717 (1996), enfd. sub nom. *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997). We do not pass on the Board's decision in *Providence Hospital*. Several courts of appeals